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In the Supreme Court of the United States

OCTOBER TERM, 1958

NO. 34

NATIONAL LABOR RELATIONS BOARD,
Petitioner.

v.

DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT DRIVERS, ETC., LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, IN REPLY.

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The Respondent, Drivers, etc., Local Union No. 639, International Brotherhood of Teamsters, takes no exception to the statements of Petitioner herein contained in those sections of its Petition for Writ of Certiorari herein entitled "Opinions Below," "Jurisdiction," "Question Presented," "Statute Involved" and "Statement."

ARGUMENT

As indicated by Petitioner Board herein, this case presents the important issue of whether Section 8(b)(1)(A)

of the National Labor Relations Act was intended by Congress, or can be used as a device by the Board, to outlaw picketing which, until the Board's decision in the instant case, has always been considered proper under the Act, and in which labor organizations from the beginning of their history have traditionally engaged. The type of picketing herein challenged is commonly known as "organization" or "recognition" picketing, and consists of peaceful picketing of an employer by a labor organization which represents less than a majority of that employer's employees for the purpose of obtaining organization and recognition as bargaining representative.

The factual frame in which the issue is presently before this Court involves the following situation: A union, after having won a Board-conducted election and been duly certified, is unsuccessful in negotiating a contract. Thereafter it engages in a strike in the course of which the striking employees are replaced by the employer so that the union loses its once majority. The employer then takes advantage of that portion of the Act which permits it to obtain an election, over the union's objection, in which election the striking former employees of the employer are not permitted to vote. The strikebreakers vote the union out, but the union nevertheless continues its picketing, this time seeking not a contract but the recognition which it once held. The Board then enjoins such picketing, invoking Section 8(b)(1)(A).

Prior to the decision of the Board in the instant case, Section 8(b)(1)(A) had never been thought available for that purpose; on the contrary, as indicated by the decision of the court below and the dissenting opinion of Board Member Murdock herein, that section had heretofore been thought to apply only to enjoining union conduct, whether carried on in connection with picketing or other type of activity, which is violent in nature and is designed directly to coerce employees in the intimidatory sense through fear of direct physical or economic retaliation.

That section, insofar as it had relation to picketing at all, was concerned with the manner or method of picketing and not the objects thereof which were dealt with in Section 8(b)(4). In other words, the section was intended to proscribe actual duress, not the indirect pressure that is the result of all picketing.

Notwithstanding all this, the Board has here found the necessary duress to exist in the mere possibility that the picketing might serve to cause economic loss to the employer, which in turn might be reflected by possible economic loss to the employees of the employer, so that this fear of possible economic loss operated to interfere with the free choice and selection of bargaining representatives given employees under Section 7 of the Act.

It is obvious that on the basis of the foregoing reasoning the Board could find justification for proscription of all picketing, regardless of its purpose or means. Whatever may be the rights of non-union employees to act as strike-breakers, or to choose to have no union to bargain for them, and to be protected from interference with these rights by the indirect and speculative "pressures" which are brought about by picketing, union employees have other equally important rights, including the right to engage in concerted activities for purposes of mutual aid and protection. Included in those rights is the right of union workers to seek, by picketing and other peaceful means, to extend organization and collective bargaining relationships throughout an entire trade or industry in particular areas as a means of stabilizing competitive wage rates and working conditions within such areas, and this right has long been recognized by our courts. *American Steel Foundries v. Tri-Cities Central Trades Council, et al.*, 257 U. S. 184; at 209; *Apex Hosiery Co. v. Leader*, 310 U. S. 469; *Exchange Bakery v. Rifkin*, 245 N. Y. 260, at 263; 157 N. E. 130, at 132.

Congress, in Section 7 of the Act, gave broad protection to the right of picketing for the purpose of mutual aid and protection, including the right to picket for recognition, but it did not stop there. Perhaps fearful of administrative at-

tempts to nullify such right through a process of interpretation, it enacted Section 13, under which it made clear that "all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read *only* if such interference, impediment or diminution is 'specifically provided for in the Act.'" (*N.L.R.B. v. International Rice Milling Co.*, 341 U. S. 665.)

Minority picketing for recognition is, of course, nowhere specifically proscribed in the Act and certainly not by any language in Section 8 (b) (1) (A), which, unlike Section 8 (b) (4) does not deal with striking or picketing as such. Furthermore, other sections of the Act, notably Section 8 (b) (4) (C), indicates that that right, far from being prohibited, is a protected right. In Section 8 (b) (4) (C) Congress undertook specifically to deal with "recognition" picketing and, very significantly, specifically outlawed such picketing *only* in the single instance where such picketing was carried on in the face of an existing Board certification of another union. The principle *expressio unius est exclusio alterius* would seem applicable, as would the statement of the Supreme Court of the United States in *Garner v. Teamsters Union*, 346 U. S. 485, at 499, where it is stated:

> "For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing."

If it is necessary, in view of the clear language of the Act as discussed above, to examine the legislative history to determine Congressional intent, that history conclusively demonstrates that Congress did not intend to proscribe peaceful picketing for recognition by minority unions or to give Section 8(b)(1)(A) the broad application ascribed to

it by the present Board majority. That history demonstrates that Congress, in enacting Section 8 (b) (1) (A), intended to deal only with certain intimidatory tactics of unions, whether engaged in in connection with picketing or in connection with other types of activities, which operated through violence or fear of violence directly to coerce non-striking employees in the exercise of their Section 7 rights. Section 8 (b) (1) (A) did not attempt to deal with picketing as such, or with the objects of picketing as such, and were intended only to proscribe actual duress and not indirect pressure.

Both Senator Ball who introduced Section 8 (b) (1) (A) on the floor of the Senate as an amendment to the Committee bill, and Senator Taft who was a principal sponsor, made this clear in their explanatory remarks made at the time the final version of 8 (b) (1) (A), as it presently appears in the Act, was explained and discussed on the Senate floor. In addition, a year later both of these Senators, as members and one as Chairman of the Joint Committee of Labor-Management Relations, 1948 (the so-called Taft-Hartley "Watchdog" Committee established under Title IV of the Act), signed a Report which expressly stated that:

> "a strike by a minority group of employees for recognition is not an unfair labor practice under the present Act. . . . A labor organization may lose in an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it."

It is further significant that in every Congress since the 80th, which enacted Taft-Hartley, bills were introduced to broaden the scope of Section 8 (b) (4) (C) so as to prohibit minority picketing for recognition, and in each instance such bills have failed of passage.

If the Board is correct in its present interpretation of the Act as already prohibiting minority picketing for recognition, Congress apparently has been laboring in vain these many years to decide whether to enact into law this same prohibition. What has actually happened, however, is that the present Board has rushed in where Congress has feared to tread and where all previous Boards have refrained from treading. The "balance" which the present Board has attempted to strike Congress has already struck for itself; Congress has made the choice. That choice may be pleasing to some and not to others, but it is for Congress and not the Board to make. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." *Colgate-Palmolive-Peet Co. v. N.L.R.B.*, 338 U. S. 355, 363.

From the foregoing brief discussion, as well as from a reading of the decision of the court below and the dissenting opinion of Board Member Murdock herein, it would seem clear that the court below rightly decided this case against the Board's contentions, and Respondent accordingly opposes the Board's Petition to Review for that reason.

However, Respondent is obliged to agree with Petitioner that an issue of grave importance in the administration of the National Labor Relations Act and affecting the customary functioning of labor organizations under such Act is involved under the instant Petition for Certiorari. Accordingly, Respondent does not oppose the Petition herein insofar as that ground is asserted as a reason for this Court to assume jurisdiction to examine and decide the issue. Respondent is moved to take this position in view of the practice of the Board—a practice presently being en-

gaged in in regard to the issue in this case—of ignoring decisions of the court below with which it does not agree in other areas and Federal circuits where controversies involving the right of peaceful minority picketing arise. For this reason, and in view of the importance of the issue, it is desirable that a definitive ruling from this Court be obtained so that the same rule may be applied wherever the Board exercises its jurisdiction.

Respectfully submitted,

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